

STATE OF VERMONT
DEPARTMENT OF EDUCATION

)
) Special Education Due Process
) Docket No. DP07-01
)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Introduction

The Chittenden South Supervisory Union and Champlain Valley Union High School (jointly comprising the district) filed for due process on December 29, 2006 after the district and the family did not reach agreement that the offered December 20, 2006 IEP (offered IEP) should be implemented on behalf of the student. In particular, the district sought a declaration that the offered IEP provides the student with a free and appropriate education (FAPE), that CVU and community represent the least restrictive environment (LRE) for the student, and that the family make the student available to the district so that the district can implement the offered IEP.

The family and student disagree that the offered IEP provides the student with FAPE. In particular, the family and student maintain that the district did not adhere to the procedural requirements for completing an IEP, that the offered IEP does not provide sufficient duration and services, and that the community should be the LRE.

The district is represented by Robert Fletcher and Patti Page of Stitzel, Page and Fletcher. The family is represented by Peter Meyer, and the student is represented by Bessie Weiss of the Disability Law Project of Vermont Legal Aid, Inc.¹

Upon the family obtaining counsel, an Order for Continuance was granted on January 18, 2007. An Order for Stay-Put was entered January 23, 2007 keeping in place the Amended December 2005 IEP as modified by the parties. The pre-hearing conference occurred on February 2, 2007. A further Order for Continuance was granted on February 15, 2007 as a result of the blizzard.

As a result of the continuance, the testimony of two expert witnesses was taken by deposition in lieu of hearing. The hearing occurred on March 12 and 13, 2007.

¹ The family originally appeared *pro se*. Meyer entered his appearance on or about January 12, 2007 and Weiss entered her appearance on January 30, 2007.

The following decision is based upon the affidavits, joint exhibits, exhibits of the parties and the evidence adduced through testimony at the depositions and hearing.

Findings of Fact

1. The student is currently 15 years old. The student was diagnosed at birth with myotonic dystrophy and was diagnosed at two years old with autism. At all times relative to the case herein, the student has been and is eligible for special education services based on the dual diagnoses of myotonic dystrophy and autism. Further accommodations have been made to the student's program as a result of her SI joint problems.

2. The student has received services from the appropriate school district since she was three years old starting with early essential education services through the Burlington School District.

3. The student was served by the Burlington School District until she moved into the Chittenden South Supervisory Union (CCSU) during 2002.

4. When the student lived in the Burlington School District, the student's mother was actively engaged in the provision of an educational program based upon the Son-Rise® or Options Program. The Son-Rise® program is a home centered program in which the family and staff take their lead from the child and the child's interests. The program is built upon praise, interaction, and building a relationship with the child.² An integral part of the student's program has been the incorporation of music.

5. Upon moving into the district, the mother and district staff from the Shelburne Community School set up a special education program mirroring the program from the Burlington program including the creation of an education room in the family's home. The educational program was primarily directed by the mother, grandfather, and staff under the family's direction or employment. There were paraprofessionals or para educators (paras) employed through the [student] Irrevocable Supplemental Needs Trust.³

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6. The Shelburne Community School offered the student an IEP (individualized education plan) starting April 28, 2005. That IEP shifted the location of the services to a combination of a specialized classroom environment and community. The district was seeking more control over the program and a shift from the Son-Rise® program. (Exhibit J-1).

² The Son-Rise® program is not an evidence based practice, and the program is not included as a best practice in the *Vermont Interagency White Paper on Autism Spectrum Disorders, Report to the ACT 264 Board* (March 2006).

³ At present, the student also receives services through the Department of Aging and Independent Living (DAIL). Because a date was not given for the start of these services, I do not have knowledge whether DAIL services were in place when the family moved into the district.

7. The family filed for due process on May 23, 2005 and the Shelburne School District filed a counterclaim on November 9, 2005.

8. A Settlement Agreement was entered into on January 5, 2006 resolving the issues in said due process case. Said Settlement Agreement was so ordered by the Hearing Officer on January 16, 2006. (J-2). In particular, the Settlement Agreement led to an Amended IEP dated December 31, 2005 (J-3) and a Transfer Plan (J-4).

December 31, 2005 Amended IEP and Transfer Plan

9. The December 31, 2005 Amended IEP (amended IEP) incorporated the goals and objectives of the offered 2005 IEP. Both IEPs included PT and OT services. Both noted that the student chewed her finger(s) when anxious and that the student had a sleep disorder. Both called for 20 hours of training for new staff members although neither specified who would conduct the training. (J-1 and J-3).

10. The major differences were (1) dates of services and (2) the transition of services from the Shelburne Community School to Champlain Valley Union High School (CVU) with services being located in the community and school.

11. The amended IEP covered services from January 1, 2006 through June 16, 2006 and August 30, 2006 through December 31, 2006 and an extended school year program from June 26-June 30, 2006 and July 10-August 18, 2006. Services comprised 48 weeks () or 234 days of service.

12. The amended IEP noted that services would be provided by Shelburne Community School or under their supervision through June 30, 2006 when provision of services and supervision switched to CVU on July 1, 2006.

13. The Transfer Plan set out a monthly schedule through June 30, 2006 with sequential steps to transfer from the services under parent provision and control to services under district control provided by district staff in the community and school.

14. The steps in the Transfer Plan were not completed. In part, both parties experienced scheduling difficulties due to illness and family matters. In part, the parties had a different interpretation on how the steps for various activities were to be carried out. The parent did file for due process on March 22, 2006 and the district filed a counterclaim on April 11, 2006. The parties entered into mediation and agreed to resolve their issues by agreement. As a result, Special Education Due Process DP 06-05 was dismissed with prejudice on June 16, 2006.

15. The difference in interpretation has carried on throughout the case. The family believes that no further steps should be taken across categories if there is a problem with one step within a category. The district believes that a problem within one category does not stop going forward with steps in other categories. Both parties cite Ed

Sbardellati for support of their interpretation. Sbardellati testified that a problem with one step should not prevent going forward with steps in other categories.

Triennial Evaluation

16. The student's triennial evaluation was begun in December 2005 and completed by the end of June 2006. The process included a series of meetings to refine the questions for the evaluation, to identify evaluators, and to discuss the results.

17. The triennial evaluation consisted of:

- ✓ Assessment Report from Amy Cohen Drucker, Clinical Coordinator of the Autism Spectrum Program at the Baird Center, dated April, 2005 (J-5)
- ✓ Communication Evaluation Report by Nancy Clements of the Stern Center, dated June 6, 2006 (J-6)
- ✓ Occupational Therapy (OT) report by Bonnie Lachtrupp (J-7)
- ✓ Input from Kim Perkins Kelley, physical therapist (J-8)
- ✓ Ecological Inventory/Descriptive Analysis from Ed Sbardellati dated June 6, 2006 (J-9)
- ✓ Input from Amy Coach-Dietz, SLP (see J-11)

18. The reports highlight that the student has severe deficits in communication and social skills, self-care skills, and adaptive behaviors.

19. The Baird report highlights the agreement by team members that the student learns best when she experiences consistency, routine, predictability and repeated exposure and that she needs a quieter environment for learning. The Baird report notes that the student is within the range of two to three year olds in terms of adaptive behaviors. The report points out that the student's opportunity to learn skills has been limited by her restricted learning environment. The salient recommendations are:

- ✓ As the student transitions to high school, programming should be largely community based with limited time in the classroom. Classroom time should be focused on building and practicing skills.
- ✓ Skill building should be part of the community focus.
- ✓ Develop life skills.
- ✓ Wean the student from being prompt dependent.
- ✓ Enhance communication skills through work on "manding" skills and other communication aids. This includes evaluating the present communication book.
- ✓ Develop reinforcers, deal with mouthing behaviors, and build more structure into all parts of the programming.

20. The Stern Center report focused on communication and the student's highly restricted communication skills. Their recommendations mesh with the Baird report in highlighting "manding" skills, use of non-technology based materials such as communication books, and having the caregivers use minimal speech to increase the student's attention to language.

21. The recommendations of both the Baird and Stern Center reports would move the student away from the current program used by the family in which there is prompting and constant verbal communication by the family and paras.

Home and Community Based Program

22. During the time period of the Amended IEP, the student has received primarily a home and community based program. The district has provided OT and PT services throughout the time period in addition to SLP services during the first half of the period covered by the Amended IEP.⁴

23. During 2004, the district retained the services of Ed Sbardellati, Ph.D., and Lisa Lawlor as autism consultants. As part of their work, they recommended to the family that the student spend more time in the community to strengthen communication skills, social skills, and life skills. In addition, Kelly recommended that the student spend more time in the community on activities that would strengthen her endurance and physical skills.

24. The family has acted upon these recommendations and increased the time the student is in the community. Community activities include:

- ✓ Going to the post office to mail postcards and receive mail as well as interacting with the post master
- ✓ Going to different restaurants and focusing on having the student interact with wait staff to order her food
- ✓ Going to grocery stores and having the student pick items and help pay for the food items
- ✓ Going to libraries where activities include picking out materials and interacting with staff while checking out the materials
- ✓ Incorporating PT goals during pool time
- ✓ Incorporating PT goals during horseback riding (hippotherapy)
- ✓ Biking

25. The family and the paras trained by the family have described how their program works. They use an education room in the student's home to work on academic skills such as (a) working on sounds and words, e.g. the use of "ba" for bites, (b) recognizing letters, (c) pointing out body parts. They give the student a choice of activities. There is a swing in the education room. When the student is swinging, the

⁴ During this time period, the district has paid Trust staff to deliver services pursuant to the IEP. The decision will not address the exact time period for these services.

family and paras will work on communication and language skills with her. They watch videos such as Sesame Street with the student and use the videos as teaching tools. In the community, they continue with these activities. They developed a communications book. For example, the book has pictures of different food choices that the student can use to communicate to wait staff in placing an order. Throughout the program, they sing or talk to the student and give her praise when she makes a choice or responds correctly to a prompt. They take their lead from the student. There is no instructional plan regarding how to respond when the student resists an activity. They attempt to redirect; but if they are not successful, they will follow the student's lead to a different activity. The paras have not read the IEP; their knowledge of IEP goals comes from the family.

26. Although the family and paras use a schedule for their outings, their adherence to the schedule depends on a number of factors including (1) following the student's lead and interest which may lead to a shift in activity or location and (2) finding that a particular place is not available. Going into the community means entering an environment where there is less control and the possibility of distractions from other people in the community.

27. The toileting program consists of placing the student on the toilet approximately every thirty minutes. During outings, the family and staff may not be able to place the student on the toilet every thirty minutes.

28. The family and staff also do oral motor with the student. Because of the myotonic dystrophy, the student has a slack jaw and poor control over saliva and swallowing.

29. Beginning this past year, the family and paras started completing daily Outing forms. Copies of completed Outing Forms comprise part of the record. The Outing Forms include the following:

- ✓ A line for staff initials
- ✓ A list of locations and space for other that the family or paras can circle to designate which locations the student was at
- ✓ The time the outing began and ended
- ✓ A space for notes
- ✓ Toileting information including number of times peed, the times they placed the student on the toilet circling the times she peed with a note of location, the same information for B.M.s and accidents.
- ✓ Oral Motor listing times
- ✓ Space for additional notes

The Outing Forms do not provide the following information:

- ✓ Name of trust staff present
- ✓ Name of person completing form

- ✓ Length of time at each location, order of locations, identity of staff at each location
- ✓ Specifics regarding the particular educational program followed at each location, the relationship of the educational program to IEP goals and what was accomplished

Later forms added information regarding the student's identification of letters. Caitlin Schrack, a para, testified that they used the notes when something was different.

Integration of CVU Staff

30. The Amended IEP called for CVU to take over the educational program July 1, 2006. As noted above, the progress and program envisioned in the Amended IEP had not occurred prior to July 1, 2006.

31. During June 2006, there were three meetings between the family and CVU staff including Blanchard, Stearns, Linell Vilaseca, special educator, and Roseanne Fredriksen, SLP. As a result of these conversations, the parties agreed that Stearns would provide consultations but not direct services. CVU would identify and train a para. CVU would hire two of the trust paras. The parties anticipated that case management and SLP services would be switched to Hyer when she joined the team. Blanchard testified that he anticipated that CVU would take over the program on September 30, 2006.

32. The family did not want the student to be disrupted by meeting and working with Stearns and Fredriksen for a short time and then transition to meeting and working with Hyer and other CVU staff. CVU agreed to this request.

33. Because the student has significant communication deficits, the family and district made the decision that Hyer would be introduced to the student first. Then, other CVU staff would be introduced. Blanchard testified that he assigned Hyer to work with the student as both SLP and case manager because of her extensive SLP experience including work with autistic children. In putting the team together, Blanchard also hired Crystal Bluto as a para. Bluto is also a LNA, trained in CPR, has the appropriate driver's licenses to transport the student, and working toward a SLP certification. CVU created an educational room at CVU for the student's instruction modeled on the family's education room.

34. Hyer started at CVU on or about August 8, 2006. Hyer first acclimated herself by reviewing notes and records about the student including the reports from the triennial evaluation, viewing videotapes, speaking to CVU personnel and the OT and PT, and reading materials. In all, Hyer spent approximately 40 hours on educating herself about the student. Hyer then met with Blanchard and the family on August 23, 2006 at the family's home to start the transition to Hyer providing case management and SLP services. The family wanted the staff introductions to be done one at a time; the family feared overloading the student. The district agreed to introduce Hyer first then the CVU

para, the new PT, the new OT, and the special educator. Hyer believed that each introduction would take two to three weeks.

35. Hyer testified that she observed the student and attended four introduction sessions at the student's home in both the student's bedroom and the education room. Her introduction started with sitting with the student in her bedroom and watching a video with the student and her mother or para. Hyer observed how the mother and para communicated and interacted with the student; Hyer subsequently interacted with the student and received feedback from the mother. Hyer testified that she had good rapport with the student. She felt the student accepted her.

36. Hyer testified that she does not agree with the family's educational methodology or use of the Son-Rise® program. Hyer testified that she welcomed information from the family describing what the student is like and what the student can do. Hyer testified that she was told by the mother to follow the mother's lead in providing the educational components of the student's program; Hyer could not do so. During mid-September 2006, Hyer told the mother that she disagreed with some of the approaches the family was using in their program such as imitating the student's self-stimulating behaviors.

37. On September 22, 2006, the mother e-mailed Blanchard. While acknowledging the rapport between the student and Hyer, the mother indicated that Hyer would need to do many more observations and needed to be trained by the mother before allowing Hyer to work alone with the student. After the September 25, 2006 Team meeting, Hyer did another observation in the student's home.

38. The family and the district disagree about the type of training for new staff including the substance of the training and who conducts the training.

39. The family wants any staff working with the student including any professionals to be trained by the family in the student's home starting with observations and then limited introductions to the student. The family believes that they are the experts regarding the student. The introductions start with watching videos in the student's bedroom. There will be a series of introductions of increasing length to take place in the bedroom and, later, in the education room. The trainee is expected to imitate the interactions between the family and paras with the student. Later, the trainee can go on outings but the family initially wants the trainee to come for the entire day's outing to minimize changes during the day's schedule. The family will then determine who is ready to work with the student.

40. The district wants any training to be done through the auspices of the case manager. Training should include information from the family as well as information from the OT and PT. The training will focus on how to work with the student and the components of the educational program including relationship to IEP and assessment. Hyer testified that it is her responsibility as case manager to train district staff and supervise their work. Hyer has put together a training program for district staff which she

delivered to district staff in November 2006. The mother was asked to participate but declined to do so.

41. Based on the dispute over training, Hyer was unable to provide SLP or case management services to the student. As a consequence, CVU was not able to transition the educational program from the family's control to the district's control.

42. When Hyer started as case manager, CVU employed Schrack as a para. Hyer attempted to meet with Schrack to do training and supervision. Schrack was not available for meetings with Hyer.

43. When Hyer learned that the family created a communications book for the student, she offered to review the communications book and give feedback. The mother told Hyer that Kelley had looked at the book. Hyer testified that SLPs usually create communications books and then train paras, OT, and PT how to use the book.

44. As case manager, Hyer had scheduling responsibilities. In August or September, Lachtrupp gave Hyer her schedule. Based on scheduling information from the family, Lachtrupp was scheduled for OT services to find that the information CVU had from the family was not current. Lachtrupp testified that scheduling issues with other families are normally easily resolved but that was not case here.

45. As a result of the impasse between the family and district, CVU has only been able to provide OT and PT services to the student.

Daylight Savings Time

46. Dr. John Gerson has been the student's pediatrician since January, 1995. According to Dr. Gerson, he has approximately 20 to 25 patients with autism and has found that they have various sleep difficulties.

47. The student has experienced difficulty with the transition between daylight savings time and standard time when the transition has been attempted. When efforts are not made to adjust the student's sleeping pattern, the student has not had sleep difficulties except for occasions when she is ill.

48. Dr. Gerson has tried several methods to deal with the student's transition difficulties. He last used medication in 2003, but the medication was not successful. He found that medication did not work over time with the student and that the use of medication led to poor quality sleep. Dr. Gerson also had the family try to incrementally adjust the time the student goes to bed by 15 minute intervals. He last tried to have the family adjust the student's sleep pattern in either 2002 or 2003.

49. There is no evidence in the record that attempts have been made to adjust the student's sleep schedule to daylight savings time since the attempts referenced by Dr. Gerson.

October 11, 2006 Incident

50. During August and September 2006, the mother and paras took the student to CVU to help acclimate the student to the inclusion of CVU as one site for her future instruction. Initially, they drove to the school but did not enter. The next step was to enter the building. The mother and paras entered CVU 5 times with the student. They took the student's lead to walk around the building. They had the student use the toilets in the school. None of these visits were coordinated with district staff. By all accounts, the visits went well.

51. On October 11, 2006, the mother and Schrack brought the student to CVU at approximately 3:15 p.m. This visit was not coordinated with CVU staff. That time in the afternoon is ordinarily busy since students are leaving class.

52. The mother and Schrack followed the student through the hallway and onto the second floor. The student entered Blanchard's office suite which consists of three rooms. The student, her mother, and Schrack entered the small conference room off the reception area of the suite. The mother and Schrack were singing to the student.

53. Blanchard was informed by his secretary that the student was there. Blanchard had not met the student before. Blanchard went into the small room and closed the door behind him. Blanchard attempted to speak with the student and show her around the room including some pictures of other students.

54. According to the mother, the student started moaning and biting on her fingers after Blanchard came into the room. The mother reported that the student waved good-bye, was crying, and biting on her fingers. Schrack and the student left while the mother spoke a moment to Blanchard. She later realized that the student's biting had torn the skin on her finger.

55. According to Schrack, the student started to bite her fingers when the mother and Blanchard were speaking and the student tried to leave the room. The mother told Blanchard that the biting was the reason they need Ps and Qs. Schrack tried to stop the student from biting her finger. The student pulled Schrack down the hallway where Schrack was able to direct the student into the elevator. Later, Schrack saw that the student had broken the skin on her finger. When leaving the school, Mary Stearns joined the mother and walked out to the car.

56. According to Blanchard, he thought the interaction went well. He did not see the student cry. He thought she was bored and wanted to leave; he saw the mother and Schrack reassuring the student they would leave. He did see the student mouthing her hand.

57. Mary Stearns saw the mother when she was leaving Blanchard's office. According to Stearns, the mother said the student had a terrible time in Blanchard's

office. Stearns saw the student down the hallway getting into the elevator with her para. Stearns walked out of the building with the mother. Stearns saw the student get jostled by a CVU student's backpack which the student handled well. Stearns walked the mother to the car. The student was in the car looking at a computer screen with her para. Stearns said the student seemed fine.

58. The mother contacted Blanchard the next day to let him know that she believed the student was distressed and that she was invoking the part of the Settlement Agreement asking that the district investigate the incident. The Settlement Agreement provides at Section 15(b)(ii) that the case manager/designee will arrange an observation during the period of distress, consult an expert, or convene an IEP meeting. (J-2) Blanchard did not agree that the student was distressed, but started the process for setting up an observation.

59. An observation did not occur. Initially, attempts were made to schedule an observation. Blanchard first tried to arrange an observation with Sbardellati who was scheduled to be at CVU on October 23, 2006. The observation would take place at CVU. The time conflicted with the schedule the mother set for the student. Sbardellati then withdrew from doing an observation as he did not believe he was the appropriate choice.

60. Hyer then contacted Meg McGee of the Baird Center to do an observation. Hyer provided the mother with several times in November that McGee could observe the student at CVU. The mother stated the times conflicted with the schedule she had for the student. Hyer then e-mailed the mother on December 19, 2006 that an observation could occur on January 17, 2007 but asked for a response on December 20, 2006. Hyer testified that she did not believe the mother wanted to go ahead with the observation because the mother did not respond on December 20, 2006. The observation was cancelled. During this same time period Hyer was trying to arrange additional visits with the student and e-mailed the mother on December 14, 2006 conditions for the additional sessions including a condition that the mother drop the significant distress investigation.

61. Blanchard testified that he does not see the utility of doing an observation so many months after the incident. There is a belief that Blanchard may have been the trigger for the student's reaction. Blanchard is willing to remove himself from any contact with the student.

The Offered IEP

62. As part of the process to put in place an IEP upon the end date of the amended IEP (December 30, 2006), the parties used COACH as one tool. COACH stands for Choosing Outcomes and Accommodations for Children; COACH is a facilitated interview with the family and a Team member from the school that allows the family to identify life and learning outcomes and to prioritize those outcomes. Having a Team member present helps ensure that the school understands the family's priorities and reasoning.

63. Stearns attempted to schedule a time to do the COACH with the family during the summer of 2006. They were unable to schedule due to time conflicts and family needs affecting both parties.

64. Hyer asked Virginia Iverson to do the COACH interview and met with Iverson on September 26, 2006 to plan the process. Iverson is recognized as an expert on COACH. According to Iverson, COACH is a ten step process incorporating six principles. One principle is parent guidance. Iverson facilitated COACH for the family and the Shelburne School District in 2004.

65. Iverson testified that it is unusual for a school Team member not to be present for the interview. Iverson had anticipated that Hyer would be the district representative during the COACH interview with the family. The mother objected to Hyer being part of the COACH interview because she did not feel comfortable with Hyer. As a result, Sbardellati attended the COACH interview. The COACH interview took place November 13, 2006.

66. Sbardellati and Iverson reported on the COACH interview at a Team meeting on November 27, 2006. The Team meeting had been scheduled by e-mail on October 14, 2006. The mother's husband sent an e-mail on November 26, 2006 that the mother would be unable to attend the Team meeting due to surgery she had the prior week. Blanchard did not see the e-mail until the morning of November 27, 2007. The Team meeting was attended by Blanchard, Hyer, Iverson, and Sbardellati. The student's grandfather attended for the first ten minutes.

67. The November 27, 2006 meeting had not been noticed as an IEP meeting. The purpose of the meeting was to report and discuss the results of the family COACH interview. Sbardellati testified that they did not discuss placement or level of services. Iverson testified that they began the process of looking at goals and objectives and that parents are not required to participate in drafting goals and objectives.

68. Hyer testified that her task as case manager was to draft the goals and objectives. Hyer testified that the recommendations from Baird, the Stern Center, COACH and other reports were reflected in her draft of the IEP. At the hearing, Iverson testified that the goals and objectives were in line with the family's priorities from the COACH process.

69. Hyer sent notice to Team members by e-mail on December 5, 2006 that an IEP meeting was scheduled on December 11, 2006 with a follow up notice on December 6, 2006. Hyer e-mailed the mother on December 7, 2006 asking for the mother's comments regarding the student's present levels. Hyer then sent a draft IEP to Team members on December 8, 2006.

70. The December 11, 2006 IEP meeting was attended by the mother, grandfather, Hyer, Sbardellati, Kelley, Blanchard, and Williams.

71. Based on a review of the transcript of the December 11, 2006 meeting and testimony, the parties engaged in a discussion of the objective and goals of the draft IEP. The mother was an active participant in the discussion making suggestions to the objectives and goals.

72. At the December 11, 2006 meeting, they agreed to meet the next day to continue work on the draft IEP even though Sbardellati and Kelley could not attend. Iverson joined the other Team members on December 12, 2006. At this meeting, the Team members discussed the OT report, present levels, duration, services, summer services, and touched upon transition goals. Again, the record shows that the mother was an active member of the discussion and decisions.

73. The district believed the parties had reached a decision. Changes had been made to reflect the family's concerns. The mother testified at the hearing that she did not believe they had reached agreement on an IEP on December 12, 2006.

74. On December 13, 2006, the district mailed to the family an IEP dated to begin December 20, 2006 (the offered IEP) and a Form 7.

75. The salient parts of the Offered IEP (J-13) are:

- ✓ A total of 215 service days including an extended school year program of 7 weeks
- ✓ During the school year, frequency of services at 32.5 hours per week and during the extended school year program, frequency at 25 hours per week
- ✓ Community and school as location for services
- ✓ Program modifications including PT/swimming, OT/horseback riding, development of program manual, communication accommodations, and transportation services
- ✓ Two week transition plan from daylight savings time to eastern standard time
- ✓ Goals and objectives primarily focused upon communication skills and life care skills including (a) leisure activities, (b) managing minor unexpected changes, (c) drinking from a lidless cup with proper positioning, (d) making choices using verbal and nonverbal communication, (e) increased ability to engage with another in a preferred activity, (f) increased ability to share food with a preferred person, (g) increased verbal skills, and (h) increased receptive language skills
- ✓ Ongoing daily data collection and task analysis for goals and objectives

76. In addition, Form 7 highlighted a number of the changes between the Amended IEP and the Offered IEP. These changes included (a) changing case management from 15 to 20 hours per week to 10-15 hours a week, (b) changing SLP direct from 2xwk/45 min. (total of 90 minutes) to 2xwk/60 min. (total of 120 minutes), with indirect SLP going from 1xmo/1 hour (total 60 minutes per month) to 2xwk/15 min. (total of 120 minutes per month), (c) changing PT consult from once per month to once

per week equaling same amount of time per month, and (d) combining OT direct and indirect to 2xmo/60 min.

77. On December 15, 2006, the mother sent an e-mail to Team members expressing concern about a reduction in services. The mother objected to the Offered IEP by e-mail on December 19, 2006.

78. On December 29, 2006, the district filed for due process.

Subsequent events

79. The parties have continued to meet including an IEP meeting on January 29, 2007. During that meeting, the mother asked for a program of 240 service days in duration with services to be given based on a 40 hour week.

80. The district has modified the Offered IEP to include an additional 10 days of service or total of 225 days using a 32.5 hour week during the school year and a 30 hour week during the extended school year program. The district has also agreed to modify the mode of transportation.

81. Sbardellati has made a number of additional suggestions regarding the Offered IEP including an increase to 225 days of service, that the student be primarily in the community, and that the student be at the school approximately 1.5 hours per day. Other suggestions include:

- ✓ Attach the training protocol developed by Hyer in November 2006
- ✓ Include training by autism consultants
- ✓ Have specialists including district staff provide home based consultation to the family
- ✓ Extend the school day for the extended school program to 30 hours/week
- ✓ Use a third party to facilitate Team meetings

82. The district has agreed to adopt Sbardellati's recommendations.

Characteristics and Needs of the Student

83. Both parties have used expert testimony to buttress their positions regarding the educational needs of the student. The district has used Ed Sbardellati and Lisa Lawlor who have both worked as autism consultants for the district regarding the student since 2004. The family has used Dr. Stephen Contompasis and Dean Mooney.

84. Ed Sbardellati has a Ph.D. in special education and has worked the past 25 years as a senior behavioral clinician with Washington County Mental Health Services, Inc. Sbardellati is a member of the Autism Working Group of the Higher Education Collaborative, an adjunct professor at Johnson State where he supervises interns working

with autistic children, the vice-chair of the Vermont Association for Behavior Analysis, and a past autism consultant for the Baird Center.

85. Sbardellati has worked with the district for over two years regarding the student's program. He has observed the student including taking part in outings, attended Team meetings, attended IEP meetings, worked on transfer plans for the students, participated in the triennial evaluation, and provided feedback and suggestions to the district and family.

86. Sbardellati testified that the student's program has been experiential in nature, cloistered until recently, and not sufficiently rigorous for the student. He stated that the student is a good imitator and learns by repetition. The program needs to establish a baseline, objectives, and a means to measure what is being accomplished. He testified that the student needs a program in which she is corrected and redirected. He believes the community and school should be the location with the majority of time spent in the community. He testified that the program should be 48 weeks in duration and that the Offered IEP would provide educational benefit to the student if his suggestions were incorporated. His suggestions are referenced above. In addition, he believes that the student can be transitioned into the CVU program within two to four weeks.

87. Lisa Lawlor is the executive director of the Autism Society of Vermont and is responsible for the Summer Institute on Autism Spectrum Disorders, the Vermont Autism Resource Directory and participation on the Vermont Autism Task Force. Lawlor has provided advocacy and training to individuals with autism spectrum disorders, their families and providers. Lawlor is the parent of twins with ASD. Her philosophy includes that parents may know their children best but this does not mean that parents are most able to educate their children.

88. Lawlor has worked with Sbardellati regarding this student and has similar knowledge and information about the student and her program. Her testimony echoed Sbardellati's testimony. Lawlor added that the offered duration of 225 days is reasonable although a longer program of 50 weeks would be ideal. She testified that the school is part of the student's community and offers a location in which there are opportunities for intensity of specific services and opportunities for structured and safe interactions with one or two peers. She added that the student should have two paras with her in the community to ensure safety.

89. Dr. Stephen Contompasis is a developmental pediatrician board certified in neurodevelopmental disabilities and developmental behavioral pediatrics. Dr. Contompasis is a member of the Vermont Autism Task Force and helped with the development of the Vermont Interagency White Paper on Autism. He is a consultant to the Vermont Child Development Clinic and an associate professor of pediatrics at UVM College of Medicine.

90. Dr. Contompasis first evaluated the student when she was 6 months old at the Vermont Child Development Clinic and continued to see her during the first few

years of her life. In his professional capacity, he has intermittently seen her in his professional capacity over the years having last seen her in 2002. He subsequently did an observation in the community for two hours on February 16, 2007. Dr. Contompasis was contacted by the mother on or about January 4, 2007. Dr. Contompasis's current information comes from the mother and a binder of information including the reports comprising the triennial evaluation. Dr. Contompasis did not consult with any of the district staff or district consultants.

91. Dr. Contompasis testified that an extended school year is very important for autistic children to prevent regression of social interaction and communication skills. He stated that it is important to use staff who have an understanding of autism. Dr. Contompasis testified that parents have a strong understanding of their child's communication and behaviors and can provide this information to others who will work with the child. Dr. Contompasis stated that given the student's age and that she will be living with her family, the least restrictive environment should be the community.

92. Dean Mooney has a Ph.D. in clinical psychology and is licensed as a school psychologist. Mooney is the founder of Maple Leaf Clinic providing therapy and clinical neuropsychological assessments. Mooney is a national consultant working with school districts.

93. Mooney was first contacted by the mother on or about April 11, 2006 during which he consulted with the mother for approximately one hour. He had been provided with the Amended IEP, transfer plan, and information from the trust. Mooney was next contacted by the mother on or about January 8, 2007 when he had a one hour consultation with the mother. He was given the same materials as Dr. Contompasis and Dr. Contompasis's report. He subsequently did an observation of the student on February 12, 2007 at two locations for a total of two hours. Mooney has not consulted with any of the district staff or district consultants.

94. In his testimony, Mooney framed his recommendations in terms of looking at the best program for the student. Mooney indicated in his affidavit that the program duration should be 48 to 50 weeks and then later testified in support of a 52 week program. He testified there should be 35 to 40 hours per week of services and that the least restrictive environment is the community. Mooney testified that the school environment is artificial and that it is not necessary for the student to be with peers. Given the student's age and that the student will be in the care of her family long-term, he testified that the community is the proper place for the program and that the family should be an integral part of the development and implementation of the program. He recommends using professionals, not paras to deliver services. Mooney testified that it would take three to four months to transfer the program.

95. Kelley testified that the student was a complex child who needed an integrated program from all team members. The student needs to increase her physical stamina and strength. The student needs to increase her ability to walk over different surfaces and for increasing lengths of time. By building up her strength, the student will

be more physically available to learn. Kelley indicated that the student will need lifelong recreation. Kelley added that the student needs a PT who has experience working with autistic children. She indicated the team needs a facilitator.

96. The family wants to ensure that any educational program is sensitive to the student's needs and takes into consideration her behavior and coping skills. Both the mother and grandfather testified and provided affidavits. Their experience is that the student needs routine, that changes can cause her discomfort and can turn her away from the cause of the discomfort (for example, a place where she experiences stress or a new person whose introduction does not click with her). The family has used a program in which they follow the student's lead and interests and that includes a lot of cheering, praise, singing, and prompts. They have been happy with this program and feel the student is making progress. The family wants a program of 48 to 50 weeks and that is totally community based. They do not want the student in CVU unless there is a defined purpose. They want all staff assigned to work with the student to be trained in the same way they have trained the paras employed by the Trust.

97. Hyer testified that she wants to both deliver SLP services and to set up the training and supervision of paras. She wants to ensure that she can model different SLP techniques that the paras can use with the student in different environments. Hyer hopes to be able to help the student generalize skills. Hyer wants to work with the paras so they perform task analysis and the team can find baseline measures to find out what the student knows and data to evaluate the effectiveness of their program. She testified that the district believes the student needs to be with peers. They want to use CVU for (1) instruction on communication skills, OT, and PT, (2) practice of certain life skills using their kitchen and living room, and (3) targeted socialization with peers (for example eating a snack with another student). Part of their program is to help the student learn to deal with changes.

Conclusions of Law

The student meets the eligibility criteria for special education and has received special education services since she was three years old. The student is now 15 years old; the question is whether the district's Offered IEP provides the student with FAPE and should be implemented. Unlike most due process cases, this case has been brought by the district to implement the Offered IEP, and the family is fighting its implementation.

The IDEIA is predicated upon giving children with disabilities a free and appropriate education designed to meet their unique needs. 20 U.S.C. § 1401; *Schaeffer v. Weast*, 126 S. Ct. 528 (2005). FAPE includes a written IEP that is designed to reflect the results of evaluations identifying the student's needs and skills, establish annual goals and objectives, and identify the use of appropriate special educational services including any related services.

A FAPE is offered when the district has complied with both the procedural requirements of the act and when the IEP is reasonably calculated to enable the student to receive educational benefits. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-207 (1982).

Procedural Violations

The family has alleged a number of procedural violations by the district. The first prong of the *Rowley* decision is to determine whether there are any procedural violations. However, the existence of a procedural violation alone is not sufficient to void an IEP. Relief is only warranted if the violation affects the student's right to FAPE. *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F. 3d 377, 381 (2d. Cir. 2003); *J.D. v. Pawlet Sch. Dist.*, 224 F. 3d 60, 69 (2d. Cir. 2000). In particular, FAPE is denied when the procedural violations either result in a loss of educational opportunity for the student or seriously infringe on the parent's opportunity to participate in the IEP process. *Briere v. Fair Haven Grade Sch. Dist.*, 948 F. Supp. 1242, 1255 (D. Vt. 1996); *Deal ex rel. Deal v. Hamilton County Bd. of Educ.*, 392 F. 3d 840 (6th. Cir. 2004).

The inquiry is two pronged—(1) determine whether the allegation is a procedural violation, and (2) if a procedural violation exists, determine whether the violation denies FAPE.

A. Mandatory IEP participants—regular classroom teacher

Section 614(d)(1)(B) of the IDEIA sets out the members of the IEP Team as follows:

- (i) the parents of a child with a disability;
- (ii) not less than 1 regular education teacher of such child (if such child is, or may be, participating in the regular education environment);
- (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;
- (iv) a representative of the local education agency who—
 - (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
 - (II) is knowledgeable about the general education curriculum; and
 - (III) is knowledgeable about the availability of resources of the local educational agency;
- (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);
- (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- (vii) whenever appropriate, the child with a disability.

20 U.S.C. § 1414(d)(1)(B).

See 34 C.F.R. § 300.321. Vermont regulations mirror the requirements of federal law. VSER § 2364.4.

The operative criteria for the mandatory inclusion of a regular education teacher on the IEP team are that the student is participating or may be participating in a regular education environment. Here, the student is not participating in a regular education environment and there are no plans to place the student into a regular education classroom or related activity. Accordingly, the lack of a regular education teacher is not a procedural violation.

B. Mandatory IEP participants—special education teacher

The rationale for mandatory IEP team members is to ensure that the people who either have pertinent knowledge about the student and/or who will be delivering the educational services contribute to the development of the IEP.⁵

The family alleges that a special education teacher was not present at the IEP meetings held on December 11 and 12, 2006. The district has countered that Hyer is a special education provider pursuant to 34 C.F.R. §300.39(a)(2)(i) which includes SLP services as special education services and that Blanchard meets the requirement for a special education teacher as he is certified as a special education teacher in Vermont. In addition, the district argues that Hyer can stand in as a special education teacher. In comments to 34 C.F.R. § 300.321 dealing with a special education provider substituting for a special education teacher, the commentators note that “...the Act leaves open the possibility that there may be other appropriate circumstances when a special education provider could substitute for a special *education* teacher. These are decisions best left to State and local officials.” Federal Register, Vol. 71, No. 156, (8/14/06) at page 46670. The Vermont regulations do not specifically address when a special education provider can stand in for a special education teacher.

A key component of the student’s IEP is SLP services. As a certified SLP, Hyer meets the criteria for a special education provider and meets the criteria for having both (1) pertinent knowledge about the student based upon her review of materials and observations of the student and (2) being identified as the professional to deliver SLP services in addition to being the case manager. Although SLP services may be part of special education services, a certified SLP is not a certified special education teacher.

Blanchard is a certified special educator who has pertinent knowledge about the student. Although Blanchard is acting as the representative of the LEA, he can also meet this requirement.

⁵ The March 12, 1999 attachment to the prior federal regulation, 34 C.F.R. § 300.344(a)(3) noted that special educator or special education provider should be the individual who is or will be responsible for implementing the IEP. These remarks have been incorporated into the August 14, 2006 comments regarding 34 C.F.R. § 300.321(a)(3) found at Vol. 71, page 46670 of the Federal Register.

Even if there is a question about Blanchard filling the post of special education teacher for the IEP meetings, the violation in this case would be a technical violation not rising to the level of interfering with FAPE. *Johnson by Johnson v. Olathe Dist. Schs., Unified Sch. Dist. No. 233*, 316 F. Supp.2d 960 (D. Kan. 2003) (absence of special education teacher a mere technical violation that did not deny the child FAPE since the IEP team included member who would be primarily responsible for implementing the IEP.) Accordingly, there is no violation of FAPE.

C. November 27, 2006 Team Meeting

The family alleges that the November 27, 2006 meeting was actually an IEP meeting which was not properly noticed and which should not have occurred as the parent, a mandatory IEP attendee, could not attend. The district counters that said meeting was not an IEP meeting; thus, there are no procedural violations.

The Amended IEP calls for monthly Team meetings. The meeting in question had been scheduled during mid October as a Team Meeting. In the interim, the parties had moved ahead with the COACH process to gain the family's input for the upcoming preparation for an IEP. Because district personnel were not part of the COACH process, the Team meeting gave Iverson and Sbardellati a vehicle to inform the Team members about the family's input.

Said meeting is properly characterized as a Team meeting and not an IEP meeting. Thus, there were no procedural violations.

D. Parental Input into the IEP Process

Parents are an integral part of the IEP process. Pursuant to the IDEIA, they are mandatory members of the IEP team. Here, the family claims that they have not been able to meaningfully participate in the IEP process. The family argues that there was not proper discussion of the triennial evaluation, discussion of the range of placements, discussion of the parent's concerns, that the process was rushed, and that the end result felt predetermined. The district argues that the family was able to participate, that family suggestions were incorporated into the Proposed IEP, and that the IEP was not predetermined.

Before addressing the specific allegations, it is important to consider context. The record provided by both parties is replete with minute notes of Team meetings, triennial evaluation related meetings, transfer plan meetings, meetings to discuss different interpretations of the Amended IEP, the COACH process, observations and individual sessions between particular district staff with the student and family, and many e-mail communications. Throughout this history, the family (the mother, in particular) has been an articulate advocate for the family's perception of the student's educational needs. The IEP meetings cannot be looked at in isolation. The fact that a particular report was not mentioned by name at an IEP meeting does not mean that the report was not considered

by the parties in how they articulated their positions at the IEP meeting or in how a particular part of the IEP was drafted.⁶

“Meaningful participation” means the family has the opportunity to comment on the IEP and make suggestions for changes. *Deal ex rel. Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004; *Fuhrmann v. East Hanover Bd. of Educ.*, 19 IDELR 1065 (3d Cir. 1993). “Meaningful participation” does not mean that the district acquiesces to the family. *Blackmon v. Springfield R-XII Sch. Dist.*, 31 IDELR 132 (8th Cir. 1999).

The most serious allegations are those that the district predetermined the IEP services and placement. The *Deal* case is instructive. In *Deal*, the district had invested time and money into a particular methodology that was used with students diagnosed with a specific disability. Based on this investment, the district had already determined not to offer a different methodology to students. Their decision impacted the particular student because the district was not going to consider evidence as to the student’s needs or the effectiveness of the evidence based program the student was currently using. Given the situation, the parents were unable to participate and the procedural violation was a violation of FAPE. See also *Spielberg ex rel. Spielberg v. Henrico County Public Schools*, 853 F.2d 256 (4th Cir. 1988); *W.G. v. Board of Trustees of Target Range School District No. 23*, 960 F. 2d 1479 (9th Cir. 1992).

Here, the district gave appropriate notice prior to the scheduled December 11, 2006 IEP meeting. A draft IEP was circulated to all Team members; the draft IEP had already incorporated family feedback obtained through COACH. In addition, Hyer solicited information from the mother prior to the IEP meeting regarding the student’s present levels of Educational/Functional Performance. Using a draft IEP at a meeting is not necessarily a predetermination; a draft IEP can be a tool to focus discussions including a quick assessment of where there are areas of agreement and where there are areas which need discussion and changes. Presenting draft goals does not violate the IDEA as long as the family is not precluded from discussing the goals at the meeting. *New York City Department of Education*, 45 IDELR 236 (SEA NY 2005)

A review of the December 11, 2006 meeting shows a discussion regarding portions of the IEP. Changes were made to goals and objectives based on suggestions by the family. These changes show that the family’s participation was more than mere form.⁷ At the December 11 meeting, the parties reviewed a number of dates and made arrangement to meet again on December 12. They did so knowing that Sbardellati (autism consultant) and Kelley (PT) would be unable to attend that particular meeting.

⁶ In reviewing the Offered IEP, one can see how specific provisions of the triennial evaluation have made their way into the articulation of the goals and objectives.

⁷ I want to note that the filing for due process has not stopped the process of the parties meeting to further refine the specifics of the student’s program. The parties are to be commended for continuing to work on these issues.

Iverson was brought into the December 12 meeting. Given the agreement of the parties, any objection to the absence of Sbardellati and Kelley is waived.⁸

The family has raised transition plans. The draft IEP referenced a transition plan that was removed from the IEP after family comments at the IEP meeting. However, the student will not turn 16 years old during the pendency of the Offered IEP which means there is no requirement to include a transition plan in the IEP. 34 C.F.R. § 300.320(b).

The family disagrees with specific portions of the IEP. These disagreements are better considered in whether the district's Offered IEP provides the student with FAPE. There are insufficient grounds to find that there were procedural violations that denied FAPE.

FAPE

The second prong of the *Rowley* decision is whether the IEP is reasonably calculated to enable the student to receive educational benefit. *Rowley* has been characterized as providing the student with a “basic floor of opportunity”; there is no requirement to maximize the student's program. *Rowley*, supra; *Walczak v. Florida Union Free S.D.*, 142 F.3d 119 (2nd Cir. 1998); *Robinson v. Council Rock Sch. Dist.*, 46 IDELR 38 (E.D.Pa. 2006); and *Doe v. Bd. of Education of Tullahoma City Sch.*, 20 IDELR 617 (6th Cir. 1993).

In order to comply with FAPE, more than minimal educational benefit is necessary. *Oberti v. Bd. of Educ.*, 995 F.2d 1204 (3rd Cir. 1993). The Second Circuit stated that “for an IEP to be reasonably calculated to enable the child to receive educational benefits, it must be likely to produce progress, not regression”. *Weixel v. Bd. of Educ.*, 287 F.3d 138, 151 (2nd Cir. 2002) quoting *M.S. v. Bd. of Educ.*, 231 F.3d 96, 103 (2nd Cir. 1998).

Before addressing whether the district's IEP is reasonably calculated to enable this student to receive an educational benefit, I want to be clear that the following analysis is based on the offered IEP as amended by the district to include Sbardellati's recommendations including changes to duration, hours of service during the extended school year program, and the other changes noted in the findings of fact.⁹ In addition, the issue of daylight savings time will be discussed separately below as the family's objection is in the nature of asking for an accommodation to the IEP.

The parties are in agreement that the student has serious deficits in terms of her ability to communicate with others, to socialize with others, and to take care of her needs (life skills). Given the student's age, the family and the district have a short window of

⁸ The mother also raised objections based upon her health. However, the parties provided no specific evidence to support a claim that the mother was unable to effectively participate in the meetings.

⁹ The family had objected to including the amendments of the Offered IEP on procedural grounds. These objections were denied as the family is not prejudiced by consideration of the Offered IEP as strengthened by the district.

opportunity to work together to enhance the student's skills to live as an adult in the community. The parties have philosophical differences regarding the methodology of the program, who provides the program including training of staff, and where the program occurs.

The district is offering an IEP that is built upon an assessment of the student's present level of functioning. The triennial evaluation highlighted the student's communication needs and life skills needs. Moreover, both Baird and the Stern Center highlighted approaches whose methodology is different than the methodology of the Son-Rise® program currently used by the family. One highlight of the triennial evaluation is the need for a more rigorous program including the development of baseline measures, use of task analysis, and built-in evaluation of the program. The district is incorporating these changes into their IEP and program with a focus on increasing the student's ability to mand and use communication aids. Moreover, the district need not incorporate every change or recommendation from an evaluation. *Washington South (VT) Supervisory Union*, 20 IDELR 1073 (OCR 1993).

In addition, Sbardellati and Lawlor are in accord that the district's program offers the student the opportunity for educational benefit. To the extent there are differences of opinion between the district's experts and the family's experts, I am giving greater weight to the opinions of Sbardellati and Lawlor. The district's experts have acted as autism consultants for the district for over two years. The major difference between the two sets of experts is that the family's experts believe the community is the LRE, and Mooney is predicated his recommendations upon what is best for the student rather than what constitutes FAPE. The district experts are more familiar with the student, the family, and district staff; they have more direct knowledge about the program the student has received through her family; and they have more knowledge about the district's ability to serve the student. *San Juan Unified School Dist.*, 36 IDELR 198 (CA SEA 2002).

Part of the discord comes from the shift from a family centered program to a district centered program. The Amended IEP had envisioned that shift occurring during the December 31, 2005 to December 30, 2006 program year. Due to a number of circumstances, this shift did not occur.¹⁰ The district has offered an IEP that makes this shift occur. Based on the evidence, there is no reason not to follow through.

The district is ready to move forward. A training curriculum has been prepared for staff; the family is a component of the training curriculum to pass on their insights and knowledge of the student. The district has the responsibility to hire, train, and supervise staff. *Slama v. ISD No. 2580*, 259 F. Supp 2d 880 (D. MN 2003). The district has the responsibility to plan the curriculum consistent with the IEP. The family does not

¹⁰ In part, there were circumstances beyond the control of the parties due to illnesses and family commitments. In part, the circumstances came from conflict between the parties. Both parties have raised good faith arguments. At this juncture, I do not believe that the parties, and most importantly—the student, will gain from this type of determination. The parties have an opportunity to move forward on behalf of the student.

have the right to determine the contents of the curriculum. *Lachman v. Illinois State Board of Education*, 852 F.2d 290 (7th Cir. 1988), *cert. denied*, 488 U.S. 925 (1988).

LRE is a separate component to consider. The IDEIA is predicated upon educating children with disabilities in regular classrooms to the extent possible or in the LRE. 20 U.S.C. §§ 1401-1485; *Rowley*, supra. Children with disabilities are only removed from the regular education environment “if the nature or the severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily”. 34 C.F.R. § 30.114(a)(2). The emphasis is to mainstream children with disabilities to the extent possible. If mainstreaming cannot be achieved, the parties look at a continuum of placements with homebound programs being the most restrictive. 34 C.F.R. § 300.115.

The parties agree that the community is a crucial part of the student’s IEP. The family argues that the Baird report does not support the school as a location for the student’s program. The Baird report does not exclude the school as a part of the program; the Baird report cautions that the time in school should be limited and used to build and practice skills. Sbardellati testified that the student’s program can include 1.5 hours daily at CVU. At present, the student receives an equivalent amount of time in the family’s education room and home working on particular skills.

The district has created a space within CVU modeled on the family’s education room in order to provide the student with a quiet space and an opportunity to build and practice skills, in particular communication skills. CVU also has a designed kitchen and living room for a student to work on life skills.

The fact that the student will live with her family in the future, away from a school environment, is not a reason to exclude CVU now as part of the community for services.

The family has raised whether the student should transition to daylight savings time. One can understand that having the student transition to time changes would be more convenient to school staff. However, past attempts to transition the student have not worked and have caused the student sleep difficulties with resulting tiredness. For the past few years, the student has not attempted this transition, and there is no current data to indicate how the student would tolerate a transition now. Based on the evidence in the record, I am reluctant to have the student transition to daylight savings time at this point. The parties should continue to consult with appropriate medical personnel as it may be beneficial for the student to learn how to make this transition as she ages out into adult services.

The family has also raised the “significant distress” incident of October 11, 2006. There is not sufficient evidence in the record to determine whether the student experienced significant distress. Both parties bear some responsibility in delaying an observation. But, the issue is now moot. Given the intervening five months, scheduling an observation does not make sense. Given the intervening five months, it is unlikely,

even assuming distress, that a repeat would be triggered. Blanchard has agreed to remove himself from contact with the student. The district has a transition plan in place.

Accordingly, I find that the district's IEP offers the student FAPE. To implement this IEP will take commitment and communication between the parties. To facilitate this process, a neutral third party needs to be involved.

Order

1. The Offered IEP with the following changes provides the student with FAPE and shall be implemented. These changes are:
 - a) The duration will be 225 days. The duration includes seven weeks of an extended school year program.
 - b) During the regular school year, the hours of service will be 32.5 hours per week. During the extended school year program, the hours of service will be 30 hours per week.
 - c) LRE shall be the community and CVU. The portion at CVU is limited to 1.5 hours per day.
 - d) The November 2006 training protocol developed by Hyer will be attached to the IEP.
 - e) The training components for staff will include training by autism consultants.
 - f) Specialists including district staff will provide home based consultation to the family.
 - g) Two staff members will accompany the student on outings in the community.
 - h) Transportation provided for the student will be in a car.
 - i) Transition to daylight savings time will be deleted.
2. The district will continue to contract with autism consultants.
3. The district shall arrange for a facilitator to lead all meetings (IEP, team, etc.) involving the student. The district shall contact Susan Boyd at the Vermont Department of Education who will assign a facilitator from its group of special education mediators.

Dated this 27th day of March, 2007 at Burlington, Vermont.

Lila Shapero
Hearing Officer

Appeal Rights

Parties have a right to appeal this decision by filing a civil action in a federal district court or a state court of competent jurisdiction pursuant to 20 U.S.C. § 1415(e). Such appeal must be commenced within 90 days of the notice of this decision.